

TRI-STATE GENERATION AND
TRANSMISSION ASSOCIATION, INC.

IBLA 81-985

Decided April 29, 1982

Appeal from decision of Wyoming State Office, Bureau of Land Management, dismissing protest challenging imposition of annual rental charges for communications site right-of-way. W 70867.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Fees--Rights-of-Way: Federal Land Policy and Management Act of 1976

While sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976), indicates that the Secretary of the Interior may charge less than fair market value for an annual right-of-way rental, including no charge, the legislative history of that provision reveals that Congress intended that free use be restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large.

2. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Fees--Rights-of-Way: Federal Land Policy and Management Act of 1976

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976), the Secretary of the Interior may charge less than fair market value for a right-of-way rental. The regulation, 43 CFR 2803.1-2(c), implementing that provision sets forth the circumstances under which no fee or a fee less than fair market rental may be authorized; however, it specifically excludes cooperatives whose principal source of revenue is customer charges from such consideration.

APPEARANCES: Linda M. Lazzerino, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Tri-State Generation and Transmission Association, Inc., has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated July 22, 1981, dismissing its protest challenging the imposition of annual rental charges for its communications site right-of-way, W 70867.

On July 22, 1981, appellant was granted a communications site right-of-way for the "Bear Park Microwave Site," for a term of 30 years, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1976). The site is situated in sec. 6, T. 25 N., R. 81 W., sixth principal meridian, Carbon County, Wyoming.

The annual rental charge for appellant's right-of-way was determined to be \$250, "subject to appraisal." Appellant paid the annual rental in advance of issuance of its right-of-way but, in a cover letter accompanying payment, dated June 30, 1981, appellant stated: "By making payment of this estimated rental charge, Tri-State does not wish to create the impression of agreeing with the amount or the practice of payment of an annual rental."

BLM treated appellant's cover letter as a protest and responded thereto in its July 22, 1981, decision. BLM held that appellant fell within the class of right-of-way holders required to pay annual rental, based on the fair market value for the use of their rights-of-way. BLM recognized that it had discretionary authority to charge no fees or a fee less than the fair market value in the case of certain holders, but concluded that such authority did not apply in the case of "municipal utilities and cooperatives," citing 43 CFR 2803.1-2(c)(1).

Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976), provides that the holder of a FLPMA right-of-way "shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way." See 43 CFR 2803.1-2(a). In addition, the statute provides:

Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned * * * for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest. [Emphasis added.]

Regulations implementing the right-of-way provisions of FLPMA were not promulgated in final form until July 1, 1980. See 45 FR 44526 (July 1, 1980). Prior to that time, 43 CFR 2802.1-7(c) (1979) provided, in relevant part:

(c) No charge will be made for the use and occupancy of lands under the regulations of this part:

(1) Where the use and occupancy are exclusively for irrigation projects, municipally operated projects, or non-profit or Rural Electrification Administration projects, or where the use is by a Federal governmental agency.

See 35 FR 9637 (June 13, 1970).

On October 9, 1979, the Department published proposed rules governing rights-of-way. See 44 FR 58106 (Oct. 9, 1979). These proposed rules included responses to comments made regarding an "outline of procedures" for granting rights-of-way submitted to user groups, states, and other involved governmental agencies and interested public and private groups on November 14, 1977. In response to comments regarding entities entitled to free or lesser charges and in explanation of the proposed rules, BLM stated:

Failure to charge fair market value provides a subsidy by all the public. It follows that free or lesser charges should be used only in those circumstances where all the public benefits from the use. Non-profit entities that are essentially tax or donation supported and which are engaged in a public or semi-public activity designed for the public health, safety or welfare will qualify for lesser charges. As a matter of equity, we believe it is inappropriate to charge lesser fees or grant free use when the holder is engaged in similar business and follows practices comparable to private commercial enterprise. For this reason, REA cooperatives and municipal utilities whose

principal source of revenue is customer charges will, hereafter, be charged fair market value fees. [1/ Emphasis added.]

44 FR 58112 (Oct. 9, 1979). The proposed rules in this area were subsequently adopted, unchanged, as the final rules.

The relevant regulation, 43 CFR 2803.1-2(c), which was part of that rulemaking, states:

(c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:

(1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.

(2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.

(3) When a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary. [2/]

1/ Also cited in the response was a quotation from the legislative history of FLPMA. That quotation, taken from Senate Report No. 583, reads in full:

"Subsection (f). This subsection provides that no right-of-way shall be issued for less than 'fair market value' as determined by the Secretary. The proviso at the end of the subsection qualifies this standard where the application is a State or local government or a nonprofit association. In this case, the right-of-way may be granted for such lesser charge as the Secretary determines to be equitable under the circumstances. However, it is not the intent of this Committee to allow use of national resource land without charge except where the holder is the Federal Government itself or where the charge could be considered token and the cost of collection would be unduly large in relation to the return to be received."

S. Rep. No. 583, 94th Cong., 1st Sess. 72-73 (1975) (emphasis added).

2/ In the preamble to the final rules governing "[r]ental fees" for rights-of-way, BLM stated:

"The rulemaking attempts, with certain enumerated exceptions, to treat all those who use the public lands for the same purpose in the same way. It would not be appropriate to charge one holder a rental based on fair market value for the right-of-way grant and not charge the same fair rental to another holder in like circumstances who is using the public lands for the identical purpose."

45 FR 44523 (July 1, 1980) (emphasis added).

In its statement of reasons for appeal, appellant contends that it is qualified under 43 CFR 2803.1-2(c)(2) and (3) to be considered for free or lesser charges for its right-of-way. 3/ Appellant states that it qualifies under 43 CFR 2803.1-2(c)(2) because it is a nonprofit cooperative

supplying electric energy at wholesale to twenty-five rural electric distribution cooperatives serving consumers in the three states of Wyoming, Colorado and Nebraska. It is member owned and is not a subsidiary of a profit-making business or enterprise. This business is a public utility under the laws of Wyoming * * * Colorado * * * and Nebraska * * *. 4/

(Statement of Reasons at 1).

3/ Appellant states that the amount of the annual rental charges is "not at issue in this appeal," because fair market value has yet to be determined by a BLM appraisal. Accordingly, we will not consider this issue.

4/ In its application for a right-of-way dated Jan. 28, 1980, at page 2, appellant described the intended purpose of its proposed microwave site, as an important part of its electrical transmission network, as follows:

"As part of our long-range expansion plans to improve the efficiency and dependability of electrical service to our customers, we are constructing a microwave communication system in the three-state area in which we operate. This system will allow Tri-State to constantly monitor power availability and demand at virtually every substation and power supply point. Major substations will be connected to the microwave backbone system directly by means of dedicated microwave links aimed directly at the substations. Small substations will communicate with the microwave system by VHF telemetry radio. Both for normal switching operations and in times of emergency, such as ice or snow storms, tornadoes, etc., we can automatically switch power routes at our substations to keep electricity flowing over alternate line routes by means of a radio signal sent through the microwave and VHF radio system. A VHF radio telemetry system will be installed at the microwave sites to send and receive data from numerous electrical substations located around the microwave sites. The microwave sites will also provide facilities for a UHF mobile radio system which will allow Tri-State's field crews to have reliable communications with the dispatch offices. Tri-State's service area is primarily in rural or sparsely populated regions where communication facilities are lacking. The UHF mobile relay stations located at the proposed microwave sites will be paramount in promoting the maintenance and restorative system operations within the service area."

Appellant asserts that cooperatives are only specifically excluded from the enumerated exceptions, under 43 CFR 2803.1-2(c)(1), in the case of governmental agencies.

Appellant argues that it is a nonprofit corporation, within the meaning of 43 CFR 2803.1-2(c)(2) because neither FLPMA nor the regulations contain a definition of "nonprofit corporation" and that that term is defined in Black's Law Dictionary at page 1207 (4th ed. 1951) as "not designed primarily to pay dividends on invested capital." Appellant states that there is no basis in law for distinguishing nonprofit corporations on the basis of whether they are tax or donation supported, rather than depending on customer charges. Appellant makes this argument in response to a statement in BLM's decision that "[n]on-profit entities essentially are tax-or donation-supported and engage in a public or semi-public activity designed for the public health, safety, or welfare."

Appellant also contends that it qualifies under 43 CFR 2803.1-2(c)(3) because it provides a valuable benefit to the public and the programs of the Secretary at reduced rates, and that its services are provided "at cost," with rates "reduced by that amount which would otherwise be charged as profit." It states that it provides a vital service to its members and its members are, in turn, "under a duty to furnish the service to any applicant within their certificated territory." Appellant states further that its "transmission lines and associated communication components are part of an interconnected system that supports the reliability of electrical power" in other areas. Finally, as a purchaser of Federal hydroelectric power, appellant asserts that it supports Federal programs.

[1] The question presented is whether appellant qualifies for no fee or a lesser fee under the statute and regulations. 5/ The legislative history of section 504(g) of FLPMA precludes consideration of no fee for appellant in this case. That legislative history (see note 1, supra) indicates that free use is restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large. However, we must still determine whether a lesser fee is applicable.

[2] Were this case to be decided merely on the language of section 504(g) of FLPMA, it might be possible to conclude that appellant was entitled to be considered for the imposition of a "lesser charge" for the use of its right-of-way. However, we must also consider those regulations promulgated to implement section 504(g) of FLPMA. While under 43 CFR 2802.1-7(c)(1) (1979) "cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 [as amended, 7 U.S.C. § 901 (1976)]" were exempt from any annual rental charges (Continental Telephone of the West, 35 IBLA 279, 288, 85 I.D. 186, 191 (1978)), the present regulations do not dictate that an exemption be granted for any organization. Rather, they provide that the Secretary may authorize no fee or a fee of less than fair market rental under certain listed circumstances.

5/ As the amount of rental to be charged has not yet been determined pending competition of an appraisal of fair market value, the only issue before the Board is the legal issue, on the record, of whether appellant qualifies for no fee or a lesser fee. In the absence of an issue of material fact, no hearing is appropriate and appellant's request for a hearing is denied. See John J. Schnabel, 50 IBLA 201 (1980).

Appellant would not qualify under 43 CFR 2803.1-2(c)(1) because "cooperatives whose principal source of revenue is customer charges" are specifically excluded from that category. At first blush it might appear that the exclusion is limited to this category; however, the preamble to the proposed regulations, which were promulgated unchanged in final, states that "REA cooperatives * * * whose principal source of revenue is customer charges will, hereafter, be charged fair market value fees." 44 FR 58112 (Oct. 9, 1979) (emphasis added). We believe that this statement clearly indicates that the exclusionary language of 43 CFR 2803.1-2(c)(1) eliminates cooperatives from consideration for reduced charges under any category of 43 CFR 2803.1-2(c).

Appellant argues that it qualifies under 43 CFR 2803.1-2(c)(2) and (3). We cannot agree for the reason stated above. Admittedly, the regulation could have been drafted more precisely to make clear that the exclusion applied to all categories; it makes no sense logically to exclude cooperatives under the first category, yet let them qualify under category 2 or 3. Such a construction would render the exclusion meaningless. While we realize that this is a departure from previous policy, the Secretary has indicated his intent through rulemaking to charge cooperatives, whose principal source of revenue is customer charges, fair market value fees. We are without authority to disregard this duly promulgated regulation. See Colorado-Ute Electric Association, Inc., 46 IBLA 35, 47 (1980), aff'd, Colorado-Ute Electric Association, Inc. v. Watt, No. 80-C-500 (D. Colo. Feb. 3, 1982).

Appellant makes a number of arguments that it should not be charged fees because of the type of operation it is and the type of services it

provides. It points out that there is substantial precedent in other statutes for according rural electric cooperatives preferential treatment. All these arguments, however, are in essence directed at the regulation itself. Appellant takes exception with the policy of charging cooperatives fair market value rental fees. That issue was decided in the rulemaking and, as indicated above, we are bound to follow the regulation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

